U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
MERCHANT MARINER'S DOCUMENT NO. Z555 86 4908D2 and LICENSE NO. 645588	:	NO. 2535
Issued to: Michael J. SWEENEY	:	

This appeal has been taken in accordance with 46 U.S.C. §7702 and 46 C.F.R. §5.701.

By an order dated 21 June 1991, an Administrative Law Judge of the United States Coast Guard at Alameda, California suspended Appellant's License and Merchant Mariner's Document outright for six months with six additional months suspension remitted on twelve months probation, upon finding proved the charge of use of dangerous drugs. The single specification supporting the charge alleged that, on or about 27 December 1990, Appellant wrongfully used marijuana as evidenced by a urine specimen

collected on that date pursuant to a drug test program required by his employer, San Francisco Bar Pilot Association.

The hearing was held at Alameda, California on 31 January 1991 and on 12 and 13 March 1991. Appellant was represented by professional counsel. Appellant entered a response denying the charge and specification as provided in 46 C.F.R. §5.527. The Investigating Officer introduced nine exhibits into evidence and introduced the testimony of three witnesses, two of whom testified telephonically pursuant to 46 C.F.R. §5.535(f).
Appellant introduced eight exhibits into evidence and introduced the testimony of two witnesses. In addition, Appellant testified under oath in his own behalf.

The Administrative Law Judge's final order suspending all licenses and documents issued to Appellant was entered on 21 June 1991. Service of the Decision and Order was made on 28 June 1991. Subsequently, Appellant filed a notice of appeal on 2 July 1991, perfecting his appeal by filing an appellate brief on
1 August 1991. Accordingly, this appeal is properly before the Vice Commandant for review.

Appearance: John E. Droeger, Esq., World Trade Center, Suite 261, San Francisco, CA 94111.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above-captioned License and Document issued by the U. S. Coast Guard. Appellant's license authorizes him to serve as a master of inland steam or motor vessels of any gross tons; third mate, ocean steam or motor vessels of any gross tons; first class pilotage, San Francisco Bay from sea to and between the Dumbarton

Bridge, Stockton, and Sacramento, including all tributaries therein; radar observer - unlimited.

Appellant has been employed as a pilot for the San Francisco Bar Pilot Association (hereinafter "Association") for approximately six years and is commissioned by the State Board of Pilot Commissioners.

On 27 December 1990, Appellant appeared at St. Francis Memorial Hospital Laboratory, San Francisco, California to submit to a urinalysis, as required by the Association. The laboratory was designated as a collection site by the Association.

The urinalysis collection coordinator, Ms. Hamlin, had received three months orientation and had previously collected approximately 500 urine specimens for the program at the time of Appellant's test.

Ms. Hamlin provided Appellant with a specimen collection container, initiated the chain of custody form and documentation and instructed Appellant to enter a bathroom and provide a urine specimen. Appellant complied, producing the required urine specimen. Ms. Hamlin then affixed an identification label with a preprinted specimen identification number on the side of the container.

In Appellant's presence, Ms. Hamlin typed Appellant's initials "MJS" onto the tamper proof seal, placing the seal over the cap of the specimen container. The chain of custody form and other documentation were completed and verified by Appellant. Appellant acknowledged that the specimen container was sealed in his presence with a tamper proof seal and that the information

provided on the Drug Testing Custody and Control Form and specimen container was correct. This acknowledgment was executed by Appellant signing his name to the donor certification on the Drug Testing Custody and Control Form.

Subsequently, the urine specimen was placed in a shipping box and given to a courier. The courier delivered the specimen to the Nichols Institute Substance Abuse Testing Lab (NISAT), a laboratory which is certified by the National Institute on Drug Abuse (NIDA), San Diego, California. Appellant's urine specimen tested positive for the presence of marijuana metabolite in both the screening and confirmation tests.

BASES OF APPEAL

Appellant asserts several bases of appeal from the decision of the Administrative Law Judge, however, because of the disposition of this case, these bases will not be discussed.

OPINION

The Administrative Law Judge has issued an order that fails to comply with a statutory mandate. An outright six month suspension was ordered with an additional six month suspension remitted on twelve months probation following a finding that Appellant had in fact used marijuana.

The controlling statute, 46 U.S.C. §7704(c), requires that a merchant mariner's license/document be revoked "[i]f it is shown that a holder has been a user of, or addicted to a dangerous drug

. . . unless the holder provides satisfactory proof that the holder is cured." (emphasis supplied). In the case herein, the record is void of any evidence of cure. However, the Administrative Law Judge supports his order of suspension with the following comment:

> The Respondent having tested negatively consequent to his positive test and the medical review officer's opinion that the Respondent is "not addicted" lead me to believe that an order of less than revocation would be appropriate. I considered the Investigating Officer's recommendation an appropriate one.
> [Decision & Order 68-69]

The order issued by the Administrative Law Judge contravenes the operative law, 46 U.S.C. §7704, which mandates revocation unless cure is proven. Notwithstanding the fact that Appellant subsequently tested negative for drug use and the statement of the Medical Review Officer that Appellant is "not addicted" to drugs (Respondent Exhibit C), the record fails to support even a colorable argument that Appellant has been cured of his drug use.

It is a paramount and often cited tenet in suspension and revocation proceedings which involve drug use, that an Administrative Law Judge is without discretion to issue an order less than revocation unless the respondent has proven to the Administrative Law Judge's satisfaction that he is cured of drug use and/or addiction. Appeal Decisions 2476 (BLAKE) affd. sub nom Commandant v. Blake, NTSB Order No. EM-156 (1989); affd. sub nom Blake v. Department of Transportation, NTSB, No. 90-70013 (9th Cir. 1991); Commandant Decision on Review #5 (CUFFIE); Appeal Decisions 2504 (GRACE); 2494 (PUGH); 2525 (ADAMS).

Administrative agencies and their procedures, are required to follow applicable statutory authorizations and may not exceed those limits promulgated in the statute. This stands to reason, since an agency's power can be no greater than that which is given to it by Congress. Lyng v. Payne, 476 U.S. 926 (1985); America West Airlines, Inc. V. National Mediation Board, 743 F. Supp. 693 (D. AZ 1990); Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984); United States v. Amdahl Corporation, 786 F.2d 387 (Fed. Cir. 1986).

Since the record is void of evidence satisfying the statutory requirements of 46 U.S.C. §7704(c), I cannot affirm the Administrative Law Judge's order of suspension in light of this agency's duty to enforce those laws enacted by Congress to promote safety of life and property at sea. In this regard, it is significant that Congress enacted 46 U.S.C. §7704 with the express purpose and intent of removing those individuals who possess or use dangerous drugs from service aboard United States Flag vessels. House Report No. 338, 98th Cong., 1st session 177 (1983).

It must be noted that this case is specifically distinguished from cases in which, as a matter of policy, orders of the Administrative Law Judge were not disturbed (to effect a more severe order) because those orders were considered inappropriate or too lenient. See, Appeal Decisions 570 (CASPER); 1502 (WILLIAMS); 2162 (ASHFORD); 2181 (BURKE). Contrary to the case herein considered, those cases did not involve a direct statutory requirement of proof to effect a particular order. It is also

noted that my order, infra, will not necessarily result in a more severe sanction imposed by the Administrative Law Judge.

Furthermore, I specifically find the decision not to disturb the Administrative Law Judge's order of dismissal in Commandant Decision on Review No. 5 (CUFFIE), to be in error and is hereby expressly overruled for those reasons aforementioned. Additionally, I find that case not to be controlling since it was based on the predecessor statute to 46 U.S.C. §7704 (46 U.S.C. §239) rather than the current law.

My decision in this case does not emanate from any opinion regarding the leniency/severity of the Administrative Law Judge's order. On the contrary, it derives from the failure of the order to meet the specific evidentiary requirements of 46 U.S.C. §7704(c). Unless and until 46 U.S.C. §7704 is amended, where drug use is found proved, an order less than revocation will not be permitted to stand on review absent proof of cure, clearly reflected in the record and satisfactory to the Administrative Law Judge.

II

Because the issue of cure is central to this case, a discussion of what should be considered as constituting cure is in order.

A sound, reasonable basis upon which to craft a viable definition of cure exists in 46 C.F.R. §5.901(d). Using that regulation as a foundation, I consider the following factors to satisfy the definition of cure in cases where drug use is an issue:

1. The respondent must have successfully completed a bonafide drug abuse rehabilitation program designed to eliminate physical and psychological dependence. This is interpreted to mean a program certified by a governmental agency, such as a state drug/alcohol abuse administration, or in the alternative, certified by an accepted independent professional association, such as the Joint Commission on Accreditation of Health Care Organizations (JCAHO).

2. The respondent must have successfully demonstrated a complete non-association with drugs for a minimum period of one year following successful completion of the rehabilitation program. This includes participation in an active drug abuse monitoring program which incorporates random, unannounced testing during that year.

In most cases which are docketed in a timely manner, at the time when the charge of drug use is found proved, sufficient time may not have elapsed to evidence cure under the above guidelines. To avoid such a potentially unfair result, the Administrative Law Judge could continue the hearing if the respondent has demonstrated substantial involvement in the cure process by proof of enrollment in an accepted rehabilitation program. On the other hand, continuance would not be appropriate if it were based on the mere promise or assurance from the respondent that he will commence steps to effect a cure. In these latter situations, an order of revocation would be required.

The aforementioned guidelines and procedures should also be utilized regarding an issue of cure that arises pursuant to a charge of use or possession of drugs in 46 C.F.R. §5.59.

CONCLUSION

The order of suspension of the Administrative Law Judge contravenes the statutory requirements of 46 U.S.C. §7704(c) in that there is no evidence in the record that Appellant has been cured of drug use.

ORDER

The decision and order of the Administrative Law Judge dated 21 June 1991, is hereby REMANDED. The Administrative Law Judge is directed to REOPEN THE HEARING and permit Appellant to present evidence of cure or evidence of substantial involvement in the cure process to the satisfaction of the Administrative Law Judge. If such evidence is produced, the Administrative Law Judge may issue an appropriate order or continuance pursuant to Opinion II, supra. If such evidence is not produced to his satisfaction, the Administrative Law Judge shall issue an order consonant with the provisions of 46 U.S.C. §7704.

//S// MARTIN H. DANIELL
MARTIN H. DANIELL
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 18th day of February, 1992.